

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 114049
Issued to: T. W. CHRISTENSEN Z 462 40 9355

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2214

T. W. CHRISTENSEN

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 22 March 1978, an Administrative Law Judge of the United States Coast Guard after a hearing on 10 January 1978 at Portland, Maine, suspended Appellant's license for a period of one (1) month on probation for twelve (12) months upon finding him guilty of negligence. The first specification of negligence found proved alleged that while serving as operator aboard M/V BOBBIE under the authority of his license, Appellant did, on 14 December 1977 while said vessel was navigating Merchant Row, near Deer Island, Maine, in conditions of fog and restricted visibility, fail to obtain or properly use information available to determine the precise location of the vessel, causing the vessel to ground. The second specification of negligence found proved alleged that while serving as above Appellant failed to properly post a lookout, contributing to the vessel's grounding.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and both specifications.

The Investigating Officer introduced into evidence the testimony of two witnesses and two documents.

In defense, Appellant introduced into evidence his own testimony and one document.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specifications alleged had been proved. He then entered an order of suspension for a period of one month on probation for twelve months.

The decision was served on 23 March 1978. Appeal was timely filed on 20 April 1978 and perfected on 31 January 1979, after five extensions were granted to Appellant.

FINDINGS OF FACT

Appellant, on 14 December 1977, was acting under the authority of his license as operator of the M/V BOBBIE E during the passage of that vessel from Swan Island to Rockland, Maine, with a total crew of three. The vessel is a tank vessel, diesel propelled, of 61.8 feet in length. The wheelhouse is located approximately 25 feet aft of the stem, and enjoys an unobstructed field of view forward and to the sides. The vessel's navigational gear consists of one radar set and a magnetic steering compass, both of which were operating normally on the date in question.

While underway on 14 December 1977 the vessel had experienced engine loss due to contamination of the diesel fuel with water. The entire crew participated in rectifying this casualty by replacing the fuel filters and then draining down. Subsequently, several hours underway resulted in no further engine loss, and periodic inspection of the fuel filters evidenced insignificant contamination.

After sunset on the date in question, BOBBIE E, conned by Appellant, attempted a westerly transit of Merchant Row. The wind was from the east-southeast at 15 to 25 knots; seas 3 to 5 feet; the night was overcast with rain varying from moderate to heavy; visibility was approximately 1/2 mile. One crewman, Poole, was on the helm, while the other, Whitney, was in the galley. During the attempted transit no lookout was posted. Navigation was solely by radar, without the benefit of plotted positions.

Sometime after leaving Gooseberry Island abeam to starboard, the engine began to fade. Suspecting that the fuel filters needed to be drained down, Whitney went below to attend the task without any direction to do so. Appellant took the helm from Poole and directed him below to the Engine Room. The vessel had been steering a heading varying from 288 degrees magnetic to 280 degrees magnetic while transiting Merchant Row. The vessel was approximately 0.8 nautical miles north of Pell Island when the engine faded and was taken out of gear.

The crewmembers drained the filters and then proceeded to the galley to wash up after telling Appellant that the problem was corrected. The total time for this evolution was ten to fifteen minutes. During this period the engine was in neutral to minimize the engine noise, which discomfited the crewmembers in the confined engine room.

After receiving word that the evolution was completed, the Appellant engaged the engine and increased the power to bring the vessel up to speed. One to three minutes after engaging the engine, BOBBIE E went aground on Barter Island Ledges. The vessel

remained hard aground for over three hours. Immediately after initial contact with the ledge, visibility was about a half mile and both Wreck and Round Islands were visible. Lights were also visible in Merchant Harbor, which is 0.75 miles from Barter Island Ledges.

Barter Island Ledges, at the time, contained a day-beacon without radar reflector or light. It is awash at high water.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. Appellant urges that the findings of fact and conclusions of law have been based upon clear errors in the record.

Appellant contends that the Administrative Law Judge made three erroneous assumptions, to wit:

1. The time interval between engine fade and restoration of power was 10-15 minutes.

2. No radar observation was undertaken by Appellant or his crew during the period in question.

3. No lookout was posted on the evening of the casualty prior to the grounding.

Appellant further contends that the Administrative Law Judge erred in attributing the casualty to lack of maintenance of the vessel's propulsion system.

These various points will be addressed seriatim, although several are largely irrelevant.

APPEARANCE: Preti, Flaherty & Beliveau, Portland, Maine, by Martin R. Johnson, Esq.

OPINION

I

The recollection of the witnesses as to the time intervals between engine fade, engine restoration, and grounding vary to some degree. Mr. Whitney put the intervals at two to three minutes, and "immediately following coming up [from the engine room]" respectively. TR. 36-7, 59. Mr. Poole felt that the first interval was ten to fifteen minutes in length, "maybe closer to the ten

minutes side..." TR. 73. The period before the grounding he placed between one and three minutes. TR. 74. Appellant noted initially that a complete bleed-down of the system might take "with good luck about fifteen, twenty minutes," (TR. 102) although later in his testimony his estimates of the actual time varied from 5 minutes to two minutes. TR. 126, 128, 154. From clutching in until the grounding, the Appellant estimated a one minute interval. Id., 130, 134. Based on the foregoing evidence of record, I do not find that the Administrative Law Judge erred in determining that the period between engine fade and correction of the difficulty was 10 to 15 minutes. It is well settled that findings of fact will not be disturbed on review if founded on substantial evidence of a probative character on the record.

Additionally, the finder of fact with his opportunity to observe the demeanor of the witnesses deserves a certain deference in his determination of their respective abilities to observe and recount the facts.

This reasoning also supports the conclusion that the grounding occurred some short but perceptible interval later.

II

The Administrative Law Judge found as fact that Appellant was observing the radar on the night in question. Appellant urges an inconsistency between this finding and the Judge's assertion that the burden "was on him to show that failure to use the vessel's radar in a timely fashion did not contribute to the grounding." Brief at 2 (emphasis added.) It is surprising that Appellant misapprehends so completely the burden on a navigator who has stated his complete reliance on a single source of position-fixing information, particularly given a charge couched in terms of negligently failing "to obtain or properly use information available to [him] to determine the precise location of [the] vessel...." Charge Sheet, CG 2639, dtd 3 January 1978 (emphasis added).

It is manifest that during his attempted transit of Merchant Row, Appellant relied exclusively on his radar to effect the safe completion of his voyage. TR. 69,70, 112-14, 123-26, 134. It is also clear from Appellant's own testimony that he recognized the Row as dangerous waters and that his vessel's safety rested on careful navigation. TR. 116, 130-31, 134-35, 148. Yet despite this awareness, Appellant admits he was uncertain of his precise position, did not know how far BOBBIE E drifted, and did not know where Barter Island Ledges lay in relation to his vessel. TR. 125-26, 129, 138, 142, 145, 150, 155. Appellant stated he thought he was in safe waters, "otherwise I wouldn't put it ahead, if I

know I had ledge or rock ahead of me, I would of put her in reverse and gone backwards." TR. 155. In this vein, Respondent's Exhibit A is particularly illuminating. Although it shows pre-drawn track lines, nowhere on the chart does it appear that Appellant ever utilized his radar to plot the precise position of his vessel while transiting these dangerous waters. Through power fade, while underway drifting and under power again, the Appellant relied solely on the rough picture presented through the radar scope - although he knew Barter Island Ledges would not appear on the screen and was somewhere in the vicinity. The courts have stated " the care to be exercised must be in proportion to the danger to be avoided." The John Carroll, 75 F.2d 302 (2nd Cir. 1921). Even where a radar fix is taken and plotted it has been held to be negligence not to assure that the fix is as accurate as possible in areas of known dangers to navigation. Decision on Appeal No. 730. Appellant had actual knowledge of conditions demanding the exercise of care for the safety of his vessel. His negligence need not have contributed to the casualty to be actionable under 46 U.S.C. 239(b). Appeal Decisions Nos. 1353 and 2080.

The Administrative Law Judge correctly noted that a rebuttable presumption of negligence arises in the case of a grounding. Appeal Decision No. 2024 (and Decisions cited therein). Mere failure to sight aids to navigation is insufficient as evidence to rebut the inference when the record demonstrates that proper steps were not taken to determine the actual position of the vessel by use of radar ranges and bearing. During the period of repair and subsequent getting underway, Appellant did no more than look at the radar screen - and he admitted on the record that he was unsure of his precise location. Failure to ascertain position by radar plot or other sufficient means in known dangerous waters constitutes negligent failure to obtain and properly use information available to determine the precise position of a vessel. See Appeal Decision No. 1472. Even were actual contribution to the grounding a necessary element, evidence of a substantial and probative nature in this record would still support the initial decision.

III

Appellant contends in his brief, at 4, that the contents of the record demonstrate that Finding of Fact 13 [no one was posted as lookout] is erroneous. He founds this assertion on his testimony that he, himself "took the lookout and the radar." TR. 105. Yet, Appellant also testified as follows:

Q. Was there anyone assigned on the BOBBIE E to solely have that one function, was to act as lookout?

A. No... and a lookout is not good in the rain. TR. 156-57.

The testimony of the other witnesses comports with the statement of the Appellant that no one was assigned to lookout duties. Whitney, TR. 33; Poole, TR. 66,71. The Appellant cannot, in the face of his own testimony, assert that he was standing lookout, as he indicated on direct examination that he was concerned with viewing the radar - not maintaining a visual surveillance of the area. TR. 112,113. The Appellant, admitting his chief concern was with the radar, cannot cloak himself in the mantle of a lookout. A lookout may not properly have other duties. Oil Transport Corp. v. Diesel Tanker F.A. VERDON, Inc., 192 F. Supp. 245 (S.D.N.Y. 1960). See also Dahlmer v. Bay State Dredging & Const. Co., 26 F.2D 603 (1st Cir. 1928), The Sagamore, 247 F. 743 (1st Cir. 1917). It is sufficient therefore to say that the Administrative Law Judge is well supported in his finding that no lookout was posted on the night in question. The reasoning and authority set forth under the previous section numbered II with respect to negligent conduct and contribution to the grounding apply equally here.

IV

The Administrative Law Judge correctly noted that the engine failure was not due to a latent defect in fuel or engine. The behavior of the engine earlier in the day and the precautionary steps taken by Appellant to compensate for the problem attest to this. The record also supports the conclusion that some time lapsed between power restoration and the grounding. Thus the defense of inevitable accident was quite properly rejected, and the authorities cited by the Administrative Law Judge are controlling. Parenthetically, the comment at 13-14 of the initial decision as to lack of maintenance being the cause of the engine failure is gratuitous since the engine failure does not rise to the dignity of a defense against the negligence charged.

CONCLUSION

On the bases of the foregoing discussion and authorities, I find that in the present case there was established by competent evidence and permissible inference that Appellant breached specific standards of care with respect to obtaining and properly employing available information to precisely determine the position of his vessel and with respect to posting a lookout during a period of decreased visibility and known hazard. In neither of these instances has Appellant met his burden to rebut the inference of negligence resulting from the grounding of his vessel on shoals clearly designated on his navigational chart and in waters with which he was familiar. For these reasons I conclude that both specifications of the charge of negligence have been proved by

substantial evidence of a reliable and probative nature.

ORDER

The order of the Administrative Law Judge dated at Boston, Massachusetts, on 22 March 1978, is AFFIRMED.

R. H. SCARBOROUGH
VICE ADMIRAL, UNITED STATES COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C., this 29th day of May 1980.

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